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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of:

Amendment of Part 74 of the Commission's
Rules with Regard to the Instructional
Television Fixed Service

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MM Docket No. 93-24

93-106

To: The Commission

JOINT COMMENTS OF ITFS PARTIES

Submitted by:
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TABLE OF CONTENTS

<u>Item</u>	<u>Page</u>
Summary	ii
The ITFS Parties	2
Channel Loading Should Be Permitted	2
Safeguards Must Be Included	5
1. Recapture Provisions	5
2. Enhanced Demonstration of Educational Bona Fides	6
3. Clarified Definition of Allowable ITFS Programming in the Lease Context	7
4. Follow-up Reports and Renewal Requirements for Certain ITFS Parties	9
Early Thinking on Compression Issues	10
Conclusion	11

Exhibits and Attachments

Attachment A - ITFS Proceedings

Summary

With some reluctance, the ITFS Parties support changes in the FCC's rules

4. ~~Comments challenge the practice of concentrating ITFS programming for an entire~~

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JOINT COMMENTS OF ITFS PARTIES

American Council on Education, American Association of Community Colleges, Alliance for Higher Education, Arizona Board of Regents for Benefit of the University of Arizona, Board of Regents of the University of Wisconsin System, Iowa Public Broadcasting Board, Regents of the University of New Mexico and Board of Education of the City of Albuquerque, New Mexico, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board and University of Maine System (together, "ITFS Parties"), by their counsel, provide these joint comments in response to the Notice of Proposed Rule Making in MM Docket No. 93-106, FCC 93-183 (released April 26, 1993), relating to the permissibility of channel loading on ITFS stations.

The ITFS Parties

The ITFS Parties are licensees of numerous ITFS stations at locations throughout the United States, as well as recognized educational associations representing virtually the entirety of American higher education. The ITFS Parties and their member institutions use ITFS facilities to deliver instructional and educational programming to a variety of receive sites including elementary and secondary schools, colleges and universities, businesses and other locations (such as libraries, hospitals and police and fire stations). Among the ITFS parties is the nation's largest ITFS user, South Carolina Educational Television Commission, whose state-wide ITFS system consists of 65 individual systems. The University of Maine System is also developing an ITFS system with state-wide coverage, now consisting of 30 stations. Several of the ITFS Parties, including the State of Wisconsin - Educational Communications Board and the Iowa Public Broadcasting Board, in addition to being ITFS licensees themselves, are state agencies that coordinate extensive ITFS usage within their states by other educational entities. All of the ITFS Parties are acutely interested in FCC proposals that affect the educational use of this technology.

Channel Loading Should Be Permitted

On one level, the channel loading proposal appears to be part of the seemingly endless chipping away at the FCC's resolve to require all ITFS channels to be

used substantially for ITFS purposes.^{1/} Nevertheless, the FCC has already explicitly allowed ITFS and wireless cable operators to utilize channel mapping, which enables the ITFS operator to satisfy Sections 74.931(a) and (e)(2), which require that each ITFS channel be substantially used to transmit educational programming, while permitting the wireless cable operator to utilize what appears to be up to three full-time wireless cable channels. See Order on Reconsideration, 6 FCC Rcd. 6764 (1991).

In order for channel mapping to work the way wireless cable operators seek to use it, making possible a 1 to 3 ITFS/wireless cable split of the channels, the ITFS operator must stagger its use of the four channels so that no more than one channel is used at any given time. Interestingly, the FCC now states that it did not intend to "sanction...the diversion of all ITFS programming to one channel only." NPRM at para. 6. However, consistent with the principle that, in this business, FCC minimum standards quickly become industry ceilings, the 1 to 3 split has become the norm.^{2/}

^{1/} The constant stream of rule making and other proceedings involving ITFS over the past decade has literally exhausted the ITFS industry's will and ability to fend off the gradual dismantling of the ITFS service. As reflected in Attachment A, there have been dozens of such proceedings since the FCC's proposal in Docket 80-112 to reallocate channels to MMDS and authorize ITFS leasing. In Docket 80-112, comments and replies were filed by over 200 parties. By contrast, in the latest proceeding, Docket 93-24, dealing with ITFS processing, only the ITFS Association and the ITFS Parties represented the industry. At some point, the FCC must quit "tinkering" every several months with new proposals by wireless cable operators who seem to be intent on whittling away all rules that protect the educational uses of the channels.

^{2/} There is no doubt that wireless cable comments in this docket will seek to rationalize and institutionalize this split.

In approving channel mapping, the Commission apparently recognized the potential incongruity of the practice with its policy that ITFS applicants only seek the number of channels that they need for ITFS use. In footnote 48 of the Order on Reconsideration, the FCC stated that, "of course, ITFS applicants should not request more frequencies than necessary for their educational needs." Thus, the FCC created the obvious logical dilemma: if an ITFS applicant agrees with a wireless cable operator that it can schedule its ITFS programming so as to use fewer than four channels at a time, thus making channel mapping feasible, how can its educational needs be deemed to require four channels?

The ITFS Parties believe the only legally sustainable answer is that, in order to be licensed or renewed on four channels, an ITFS applicant must be able to show that it has the actual or potential need for all the channels, and that its lease agreement allows it to use all the channels when it needs to do so. When such an ITFS applicant requires the financial or operational assistance of a wireless cable operator to implement its plans, the Commission could find an adequate basis to license an entity for four channels even though that entity might be able, at least initially, to limit its programming to fewer than four channels. The ITFS Parties would not want to stand in the way of educational use of the ITFS band by such entities who, having a bona fide intent to transmit educational material, find themselves relying on a lease to accomplish their goals.

Moreover, given the permissibility of channel mapping, it makes little sense to continue to force operators to acquire expensive equipment to maintain the appearance of segregated or limited-channel educational use when, in reality, the ITFS operator can schedule its programming so that fewer than four channels will, at least at sometimes, serve its needs. The ITFS Parties therefore do not oppose a modification of the FCC's rules to permit the loading of ITFS programming on fewer than four channels, so long as appropriate safeguards are also adopted to ensure that all ITFS channels are still available for their intended use, and to prevent abuse of the FCC's leasing rules.

Safeguards Must Be Included

The ITFS Parties believe that the following safeguards are necessary.

1. Recapture Provisions. Most critically, each ITFS operator must be able to use two, three or all four ITFS channels simultaneously when its educational needs so dictate.^{3/} This merely means that the FCC should insist that ITFS lessors retain the right, now found in Sec. 74.931 (e)(1), to recapture up to 40 hours per week on each channel, without detriment. Any lease that requires an ITFS operator to use fewer than four channels should be deemed unlawful and void.

This safeguard should not be subject to negotiation between the ITFS licensee and the wireless cable operator. The ITFS party must have the right to determine its own scheduling needs and to modify that determination on reasonable

^{3/} Obviously, this means that each ITFS receive site must continue to receive interference protection on all licensed channels.

notice.^{4/} Given the relative negotiating positions of wireless cable operators and the typical educational party now entering leases, FCC lease requirements for ITFS (such as maximum 10-year terms, minimum recapture requirements, and so forth) tend to become de facto industry standards, and any leeway granted to the parties to negotiate more limited recapture rights within certain parameters would soon result in the adoption of such limited parameters as the norm. To put it another way, allowing parties to "negotiate" a lease that permits an ITFS party to relinquish recapture rights to one, two or three of its channels will result in virtually every lease limiting the ITFS party to the minimum allowed number of channels. That would constitute a de facto reallocation of the ITFS spectrum.

2. Enhanced Demonstration of Educational Bona Fides. The Commission should also require each ITFS applicant, permittee or licensee proposing to channel load to provide an enhanced demonstration of the bona fides of its educational programming plans, and should review such plans with a healthy degree of skepticism. The enhanced demonstration would have to go beyond a mere program schedule showing names of supposed ITFS programs, as now required by FCC Form 330. The ITFS lessor would have to show how its use of fewer than four channels can reasonably be expected to meet its scheduling needs for educational programming over the next year. For example, if an ITFS party proposes to limit itself to two channels (with

^{4/} Section 74.931(e)(2) permits the parties to agree that up to one year's advance written notice will be required to recapture programming time. The ITFS Parties are willing to retain the same outer limit.

appropriate recapture rights, of course), it should show specifically how it can meet its needs and the FCC's requirements for 80 to 160 hours (20 to 40 hours times four channels) of ITFS programming per week during the days and times that will be available on two channels. This showing should be supplemented by a demonstration of a close fit between the programming schedule and the specifically documented needs of its receive sites.^{5/} The time is long gone when the FCC should tolerate a Montessori pre-school with 20 "pupils" applying for an ITFS station, and engaging in channel loading, with a generic schedule of high school and college-level programming, or any schedule running outside of normal school days/hours, in order to cram the required number of hours onto a limited number of channels. The same healthy skepticism should characterize the FCC's evaluation of comparative points based on programming schedules that are crammed onto fewer than four channels.^{6/}

3. Clarified Definition of Allowable ITFS Programming in the Lease Context. As any educational entity currently negotiating with a wireless cable company can attest, the FCC needs to clarify the kind of programming that can legitimately qualify to satisfy the minimum "substantial use" requirement of the leasing rule. This is even more important if the parties propose to engage in channel mapping, as there will

^{5/} For example, an applicant proposing to provide in-school elementary programming between the hours of 8:00 a.m. and 10:00 p.m. should document that such programming will be used for all those hours, particularly those hours outside of the normal school day and on weekends.

^{6/} Otherwise, the ITFS Parties do not believe the FCC should comparatively penalize ITFS applicants proposing to engage in channel loading.

be increased pressure for the ITFS party to run programming when there is no prospective audience. We should make clear that the problem is not with the nature of any programming per se; the issue is whether receive sites are actually using it and for what purpose. The ITFS Parties have no problem with running C-SPAN or CNN as legitimate, even formal, ITFS programming if that programming is actually incorporated into the curriculum of accredited educational receive sites. The problem is that ITFS parties are now being pressured to run cable programming services, or canned or satellite-delivered educational programs, that everyone knows is not being used, and is not really expected to be used, by local educators. This practice is an oft-heard suggestion by the less-than-scrupulous wireless cable operator to the reluctant ITFS applicant who is not sure it can sustain a minimum ITFS schedule of 20 hours per channel per week. The FCC must make clear that running 20 hours of ostensibly educational or informational programming, without any receive sites actually incorporating the programming into their curricula, will not satisfy its requirements.^{7/}

^{7/} Assuming there are probably numerous ITFS applicants, permittees and/or licensees that have obligated themselves in excess capacity leases based on assurances that cable programming services would satisfy the FCC's requirements, the FCC should perhaps declare void and unenforceable any ITFS contract entered into by an educational entity that was misled by its wireless cable contractor on this point. The FCC should also consider drafting a "truth-in-leasing" disclosure statement concerning its leasing requirements which would have to be delivered to ITFS lessor by wireless cable lessees. The disclosure statement, similar to the "truth-in-lending" statements required of lenders making consumer loans, should include all of the FCC's leasing requirements, including the clarification of acceptable ITFS programming. It should be signed by the ITFS lessor and appended to each new ITFS lease.

4. Follow-up Reports and Renewal Requirements for Certain ITFS Parties. Finally, where an ITFS entity engages in channel loading, the FCC should require yearly reports from the ITFS licensee on its actual educational use of the ITFS facilities during the previous year. The ITFS Parties are reluctant to foist additional regulatory requirements on fellow-licensees or themselves. However, they are so skeptical that an educator can actually channel load between 80 and 160 hours per week of ITFS programming (clarified in accordance with safeguard 3 above) during times when the programming can reasonably be used, that additional investigation by the FCC is justified.^{8/} The FCC should, in particular, focus its attention on any programming that is aired outside the hours 8 am through 4 pm, Monday through Friday, to ensure that the programming is actually being incorporated into the curriculum of registered receive sites.^{9/}

The FCC should also consider the same information at renewal time, thus permitting it to make a reasoned judgment whether to renew the ITFS license for fewer than the currently-licensed number of channels, or at all. In addition, for ITFS licensees who have used one, two or three of their channels insubstantially or not at all, the FCC should consider a rule similar to the one for underutilized noncommercial educational

^{8/} There are only 168 hours available each week on one ITFS channel.

^{9/} This is particularly true for parties loading all their ITFS programming on one channel. There are only 40 hours available during this time period each week. Thus, at least 40 hours each week would have to be transmitted, and used, at other times.

FM channels, Section 73.561(b), requiring time-sharing by or re-licensing to other entities who, at renewal time, file applications seeking access to these underutilized channels.

Early Thinking on Compression Issues

In para. 16 of the NPRM, the FCC proposes that the channel loading rule be regarded as a temporary fix until digital compression "solves" the channel capacity problem. However, there is every reason to believe that the same scheduling issues will be important in the compression context, as wireless cable operators will continue to try to maximize the number of full-time channels available to them. Clearly, what the FCC does in this proceeding will impact the industry's activities when compression becomes a reality.

Just as clearly, the FCC needs to start thinking about the general principles that will guide its regulation of ITFS in the compressed environment. The ITFS Parties have preliminary thoughts on these principles as well, and urge the FCC to require that ITFS licensees retain the right in their excess capacity leases to use a certain amount of the channel capacity created by compression, but not require that they actually use the additional capacity. Thus, in a context where a four-to-one compression ratio is achieved, the FCC might set aside 25% of the additional channel capacity (roughly 40 hours per compressed channel per week) for ITFS use, with the ITFS operator having the right to sell back any unused time to the wireless cable operator. With channel loading, this would equate to the ITFS licensee having the full-time use of four compressed channels with the wireless cable operator having 12 compressed channels.

These numbers could be adjusted depending on the type of compression and the compression ratio employed.

Eventually, the FCC will need to decide how channel loading fits into the compression scheme. There is no doubt that it should allow loading among the compressed channels created out of a single 6 Mhz ITFS channel (as in the example in the previous paragraph), and the current proceeding would allow loading among ITFS channels in a four-channel group licensed to a single ITFS licensee. The difficult issue will be whether the FCC should allow loading between and among ITFS groups. For example, the FCC will face the issue whether it should allow five separate ITFS operators licensed on the A, B, C, D and G groups to use only channels A1, B1, A2, B2 and A3, compressed to form 20 full-time programming channels, thereby allowing the wireless cable operator to use all the spectrum from B3 through H3 as a single, seamless commercial block. This is an issue that might best await actual operational experience in the compression environment, but the ITFS Parties give notice that they are against such inter-group channel loading at this time. For the time being, an ITFS licensee should be expected to use its own channel(s) for its ITFS programming.

Conclusion

These are not easy issues. The ITFS Parties have attempted in these comments to accommodate the realistic needs of wireless cable operators and ITFS operators alike, consistent with the need to avoid de facto reallocation of ITFS channels, which they would vehemently oppose. The FCC must also approach these issues with a

sense of realism. This means recognizing and addressing current and potential abuses of the ITFS leasing requirements.

Respectfully submitted,

AMERICAN COUNCIL ON EDUCATION

AMERICAN ASSOCIATION OF
COMMUNITY COLLEGES

ALLIANCE FOR HIGHER EDUCATION

ARIZONA BOARD OF REGENTS FOR
BENEFIT OF THE UNIVERSITY
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SOUTH CAROLINA EDUCATIONAL
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STATE OF WISCONSIN - EDUCATIONAL
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ITFS Proceedings**Doc No. 80-112**

Notice of Inquiry and Proposed Rulemaking and Order (Proposal to reallocate 2500-2690 MHz band to provide additional channels for MDS and OFS and to reduce number of ITFS channels). 45 Fed. Reg. 29,323 (1980). Released: May 2, 1980. Comments and Reply Comments were filed by 208 parties.

Report and Order, (Reallocated E and F groups from ITFS to MDS and permitted ITFS licensees to lease excess capacity on existing systems). Dockets No. 80-112, 80-116, RM-3540, FCC 83-243, Adopted: May 26, 1983; Released July 15, 1983 94 FCC 1203 (1983), reconsideration denied, 98 FCC2d 129 (1984).

Memorandum Opinion & Order on Reconsideration (Denied petitions to reconsider July 15, 1983 Report and Order, reallocating eight channels from ITFS to MDS and permitting ITFS licensees to lease excess capacity for non-ITFS purposes). Docket No. 80-112, FCC 84-177, Adopted: April 26, 1984; Released: June 5, 1984

Docket No. 83-523

Notice of Proposed Rule Making, (Begins reevaluation of Commission's rules to determine if rules overly restrict activities of ITFS operators and if rules cause inefficient spectrum utilization). FCC 83-244, Adopted: May 26, 1983; Released: June 9, 1983.

Further Notice of Proposed Rule Making (Solicited comments regarding the nature and scope of permissible ITFS service; eligibility requirements for becoming an ITFS licensee; control of an ITFS facility by a licensee that leases excess channel capacity to others; procedural standards for cutting off applications that are accepted for filing; selection procedures and criteria for choosing among mutually exclusive applicants; and interference protection standards). FCC 84-363, Adopted: July 26, 1984; Released: August 10, 1984.

Report and Order (Amended rules to relax technical transmission standards, permit the operation of temporary fixed stations, permit the delivery of ITFS programming to cable systems, implement a one-step licensing process, and lengthen license term to ten years). FCC 84-362, Adopted: July 26, 1984; Released: August 13, 1984. 98 FCC2d 925 (1984).

Memorandum Opinion and Order (Denied September 14, 1984 Petition for reconsideration; affirmed policy of limiting ITFS licensees operating within a given area to a maximum of four channels; and clarified rule changes pertaining to one-step licensing, license forfeiture, and license term). FCC 85-11, Adopted: January 9, 1985; Released: January 15, 1985.

Second Report and Order (FCC modified eligibility and operating rules for ITFS, instituted comparative proceeding procedures for selecting among mutually exclusive ITFS applications, instituted cut-off procedures, finalized its requirements for non-ITFS use of ITFS facilities, and modified certain of the technical standards for ITFS). FCC 85-294, Adopted: May 31, 1985; Released: June 20, 1985. 101 FCC2d 49 (1985).

Memorandum Opinion and Order (Denied Petition for

Report and Order, (Amended technical and certain operational requirements for ITFS stations regarding posting of licenses, ITFS remote control, and unattended operation of ITFS stations). FCC 86-589, Adopted December 29, 1986; Released: January 26, 1987.

Telecommunications Research and Action Center v. FCC, 836 F.2d 1349, 1356 (D.C. Cir. 1988). The court remanded the case "for the FCC to make the basic classification determination or to explain why it should not have to" predetermine a regulatory classification for nonsubscription service offered on ITFS excess capacity. The court also rejected the Commission's decision to break ties in its comparative selection procedure for choosing among mutually exclusive ITFS applicants by using a lottery without the minority and diversity preferences of the Lottery statute.

Rye Telephone Company Proceeding (File Nos. 1660 through 1683-CF-P-89)

Application for Waiver of FCC Rules to Utilize ITFS Frequencies for Basic Telephone Service, Filed February 2, 1989; Public Notice March 1, 1989. Rye withdrew this application on August 21, 1989.

Leaco Proceeding (File Nos. 2476-CF-P-88 through 2535-CF-P-88)

Memorandum Opinion and Order (Denied request by Leaco Rural Telephone Cooperative, Inc. to use ITFS frequencies to provide basic telephone service). DA 89-718, Adopted: June 22, 1989; Released: July 3, 1989.

Nevada Bell Proceeding (File Nos. 4521-CF-P-88 through 4552-CF-P-88)

Memorandum Opinion and Order (Granted Nevada Bell's applications and waiver request to use frequencies in the 2500-2690 MHz spectrum presently allocated to ITFS). DA 88-1888, Adopted: December 6, 1988; Released: December 8, 1988.

Memorandum Opinion and Order, (Denied petition for reconsideration of Nevada Bell's waiver request to use a portion of the ITFS spectrum). FCC 90-305, Adopted: September 4, 1990; Released: September 24, 1990.

Memorandum Opinion and Order, (Granted authority for Nevada Bell to serve additional subscriber locations to the full extent of its capacity on the D and G group frequencies). DA 91-564, Adopted: May 1, 1991; Released: May 9, 1991.

Dockets No. 90-54 & 80-113,

Notice of Proposed Rule Making and Notice of Inquiry, (Proposed to eliminate ownership restrictions which limit the number of MDS and OFS channels which can be licensed to a single entity; change application processing procedures to expedite the authorization of new or improved service; and reevaluate rules regarding power limitations and service areas, equipment performance, and other technical standards). FCC 90-60, Adopted: February 8, 1990; Released: February 22, 1990. 5 FCC Rcd. 971 (1990). Sixty parties filed initial comments and thirty-three parties filed reply comments.

Report and Order, (Adopted changes proposed in Notice of Proposed Rule Making and Notice of Inquiry of February 22, 1990). Docket No. 90-54, 80-113, FCC 90-341, Adopted: October 11, 1990; Released: October 26, 1990. 5 FCC Rcd 6410 (1990).

Further Notice of Proposed Rulemaking, (Proposed reallocating H channels to OFS and requested comments on the measures necessary

Docket No. 93-24

Notice of Proposed Rulemaking, (Proposed to amend the method by which ITFS applications are filed and processed and requested comments addressing a possible change to an approach using filing windows). FCC 93-90, Adopted: February 11, 1993; Released: February 25, 1993.

Spokane Proceeding

In the Matter of Requests of North American Catholic Educational Programming Foundation, Inc.; Spokane Community College; Spokane Falls Community College; and Gonzaga University Telecommunications Association for Waivers of Sections 74.931(a) and (e)(2) Relating to the Requirements for Formal Educational Programming on Each ITFS Channel, MMB Files 920219A; 920220A; 920220B; and 920224A, Public Notice: July 23, 1992, Mimeo 24089, (Requested comments as to whether these four requests would best be addressed in a waiver proceeding or in a rule making proceeding).

Docket No. 93-106

Notice of Proposed Rulemaking, (FCC requested comments on a proposal to permit "channel loading" on ITFS stations). FCC 93-183, Adopted: April 6, 1993; Released: April 26, 1993.